



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/19314/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February 2015**

**Determination Promulgated
On 25 February 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICER - BANGKOK

Appellant

and

**MR AYE LWIN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Miss O Taiwo (Mount Azure Solicitors)

DETERMINATION AND REASONS

1. This is the appeal of the Entry Clearance Officer but I will refer to the original appellant, a citizen of Burma, born 10 February 1977 as the appellant herein.
2. The appellant applied for an entry clearance as a partner under Appendix FM of the Immigration Rules (HC 395). The application was refused on 8 October 2014. The outstanding basis of refusal following a review by the Entry Clearance Manager on

10 October 2014 was the contention that the sponsor, the appellant's wife, had not submitted relevant documents in relation to income and savings.

3. The appellant appealed and his appeal came before a panel on 27 October 2014. The panel heard evidence from the appellant's sponsor. She had been granted leave to remain in the United Kingdom as a refugee and she married the appellant in April 2012 in Malaysia. She relied upon her current income from employment and self-employment which she argued took her above the threshold of £18,600 per annum.
4. At the hearing the Entry Clearance Officer was represented by Ms Dwomoh and the appellant by Mr Htike. The panel helpfully records the submissions and its conclusions in the following part of the determination:

“Submissions

8. Ms Dwomoh relied on the refusal decision. She submitted that, in relation to her self-employment, the appellant had not provided personal bank statements for the same 12 month-period as the tax return that show the income from self employment has been paid into an account in the name of the person or in the name of the person and their partner jointly, as required by appendix FM-SE paragraph 7(f). She accepted that the immigration rules were met in all other respects.
9. Mr Htike referred us to the sponsor's evidence that the nature of her self employed business which involves selling fashion at Spitalfield Market, was such that it generated cash which was used to pay rent for the shop and her flat. Any excess cash from the business was paid into the personal bank account.

My findings

10. It is accepted by Ms Dwomoh that the appellant did supply a letter from his sponsor's employer confirming her salary and her length of employment, contrary to the ECO's assertion that this was not provided. It is also accepted that the sponsor's income from employment and self-employment is above the threshold of £18,600 and that payslips were provided for a 6 month period within 28 days before the application.
11. In relation to the evidence of self employed income, the ECO has stated that 'the documents provided and detailed above do not however satisfactorily meet the requirements'. Unfortunately it is not explained in what way that the documents do not satisfactorily meet the requirements. Ms Dwomoh relied on the fact that there is one payslip missing dated 16 January 2013 which is between the sequence of payslips dated 2 January 2013 and 30 January 2013.

12. The application was made on 20 June 2013. The appellant provided her payslips from 6 June 2012 to 5 June 2013. I find that she has provided wage slips covering a period of 6 months prior to the date of application as required by appendix FM-SE paragraph 2(c).
 13. However, even if Mr Dwomoh is correct in assuming that the ECO was referring to one missing payslip, Paragraph 1 K of Appendix FM-SE provides that where documents have been submitted, but not as specified, and the ECO considers that if the specified documents were submitted, it would result in a grant of leave, they should contact the applicant or their representative in writing to request the document(s) be submitted within a reasonable timeframe. Examples given include a document missing from a series.
 14. I found the sponsor to be a highly credible witness who is genuinely married to the appellant. She is a refugee who cannot return to Myanmar. The only fault in the application was a missing payslip covering a two week period in January 2013. It is conceded that the application meets the requirements of the Immigration Rules in all other respects.
 15. I find that given the number of payslips provided which was far in excess of the requirement to provide payslips for only 6 months, the Immigration Rules are satisfied and this application should not have been refused.”
5. The panel accordingly allowed the appeal finding that the decision of the Entry Clearance Officer was not in accordance with the Rules.
 6. The respondent applied for permission to appeal on the following grounds:
 - “1. The Rules of specified evidence are comprehensively set out in Appendix FM and Appendix FM-SE to the Immigration Rules. These set out what types of evidence are required, the periods they cover and the format that they should be in. The Tribunal although having regard to this in the determination seemingly goes on to ignore this where it sets out its finding on this issue.
 2. The appellant had failed to provide payslips covering the entire 6 month period as required under Appendix FM-SE, with the payslip for the week commencing 16/01/2013 missing. Furthermore with regards to the Sponsor’s self-employment the appellant had failed to provide bank statements showing income from the self-employment has been paid into the sponsor’s account. At the hearing the sponsor accepted she did not deposit the money into her bank account and used these monies to pay for rent and buy things as needed for her shop.

3. Paragraph 2 of Appendix FM provides that in terms of salaried employment in the UK, all of the following evidence must be provided:
 - (a) Wage slips covering
 - (i) A period of six months prior to the date of application...
 - (c) Personal bank statements corresponding to the same period as the wage slips at paragraph 2(a) showing that the salary has been paid into an account in the name of the person or their partner jointly.
4. It is respectfully submitted that when a sponsor is paid in cash, for the gross income to be taken into account, all of the monies received from employment must be paid directly into the bank. This is a mandatory requirement. Where only part of the money is deposited then only the net amount deposited can be counted when calculating the income for the purposes of meeting the financial requirement. It is respectfully submitted that this was not properly explored but [sic] the Judge of the First-tier Tribunal, there was a lack of specified evidence submitted to substantiate the claimed income based on the operating principals of Appendix FM-SE these operating principles within Appendix FM-SE of the Immigration Rules ensure that a person's income is properly evidenced and will be sustainable and as such in allowing the appeal the Judge of the First-tier Tribunal erred in law.
5. It is respectfully submitted that the Tribunal has failed to comply with the Immigration Rules and that its findings are therefore unsustainable. It is clear that the appellant cannot meet the requirements of Appendix FM-SE for the 6 month period prior to the date of application. These are mandatory requirements. Therefore the appellant cannot succeed under the Rules.
6. For the above reasons it is respectfully submitted that the JFTT erred in law and this is a proper case for the Upper Tribunals consideration. Permission to appeal is therefore respectfully sought."
7. Permission to appeal was granted by the First-tier Tribunal on 17 December 2014. Mr Bramble referred to the archived Rules which were in force at the time the Entry Clearance Officer considered the appellant's application. Under E-ECP.3.1. the applicant was required to provide specified evidence and the evidential requirements set out at page 660 of the archived Rules in respect of self-employment provide at paragraph 7(f) that

"personal bank statements for the same twelve-month period as the tax return(s) showing that the income from self-employment has been paid into an

account in the name of the person or in the name of the person and their partner jointly.”

8. The appellant in her witness statement had accepted that she was paid for her self-employment in cash. The Rule was a necessary form of cross-reference. It was necessary to show that the cash had been paid into a bank statement. The First-tier Tribunal had made a material error of law in overlooking a mandatory requirement. Article 8 had no bearing on the matter since the appellant could re-apply with the appropriate documentation.
9. Miss Taiwo submitted that the only point at issue was the missing payslip and this had been provided. Moreover the appellant’s salaried income had risen since the time of her application and by the time the respondent considered the matter it was over the relevant threshold at £18,795. In response Mr Bramble pointed out that the archived rules at page 653 made it clear that the Entry Clearance Officer was only required to consider the documents submitted with the application – the exceptions to that rule did not apply to circumstances where a salary increased after the application.
10. At the conclusion of the submissions I reserved my determination. I can only interfere with the First-tier Tribunal’s decision if it was materially flawed in law.
11. It does appear clear from the record of submissions in this case that the respondent’s representative was relying on the failure of the appellant to comply with a mandatory part of the Rules relating to specified evidence. She had not provided the bank statements that reflected her income from self-employment. She acknowledged that she was paid in cash and this was used to pay rent for the shop and her flat and it was only the excess cash from the business that was paid into the personal bank account.
12. It may be that the panel misunderstood or mistook the submission that was being made and focused on the issue of the missing payslip which as Mr Bramble submits is something of a red herring. Missing payslips might very well be covered by the evidential flexibility Rule. However, the point relied on by the Presenting Officer was a very different point that the panel neglected to consider.
13. The fact that the appellant’s present income exceeds the threshold required does not entitle her to succeed in this appeal as Mr Bramble explained. However, she has been found to be a highly credible witness who is genuinely married to the appellant and on the current evidence she does satisfy the income threshold by virtue of her salaried employment without reference to the income from her self-employment.
14. As the appellant is now in the happy position of fulfilling the requirements of the Rules and need simply make a fresh application armed with the appropriate evidence I do not consider that any arguable Article 8 issues arise. It was open to her

to present the appropriate evidence at the relevant time and she now has the option to make a fresh application.

Notice of Decision

I remake the decision. The appeal of the Entry Clearance Officer is allowed. The appellant's appeal is dismissed.

No anonymity direction is made.

FEE AWARD

In all the circumstances I do not disturb the fee award that was made by the panel in this case.

Signed

Date 24 February 2015

Upper Tribunal Judge Warr